82-1154

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOROUGH OF SAYREVILLE, JOHN E. CZERNIKOWSKI, RANIERO TRAVISANO, KENNETH W. BUCHANAN, SR., WILLIAM JACKSON, JOSEPH M. KEENAN, JR., THOMAS R. KUBERSKI and FELIX WISNIEWSKI,

Petitioners,

vs.

MIDDLESEX COUNTY UTILITIES AUTHORITY and WILLIAM FRENCH SMITH, UNITED STATES ATTORNEY GENERAL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the Tenth Amendment to the United States Constitution is violated by the federal government requiring a municipality to enact a particular tax.

Parties to the Proceedings

Borough of Sayreville; John E. Czernikowski, Mayor; Raniero Travisano, Kenneth W. Buchanan, Sr., William Jackson, Joseph M. Keenan, Jr., Thomas R. Kuberski, Felix Wisniewski, as members of the Borough Council of the Borough of Sayreville, petitioners-defendants-third party plaintiffs.

Middlesex County Utilities Authority, respondent-plaintiff.

William French Smith, United States Attorney General; Anne M. Gorsuch, Administrator, United States Environmental Protection Agency; Jacqueline Schafer, Regional Administrator, Region II, United States Environmental Protection Agency and W. Hunt Dumont, United States Attorney, respondents-third party defendants.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Borough of Sayreville, John E. Czernikowski, Raniero Travisano, Kenneth W. Buchanan, Sr., William Jackson, Joseph M. Keenan, Jr., Thomas R. Kuberski, and Felix Wisniewski respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 12, 1982.

Opinions Below

Petitioners request review of a portion of the decision of the United States Court of Appeals for the Third Circuit reported at 690 F.2d 358 (1982).

The decision of the United States District Court for the District of New Jersey was a bench opinion and unreported. The transcript of the District Court's opinion is reproduced in the Appendix at p. 24a, *infra,* and the Judgment Order at p. 31a, *infra.*

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 12, 1982. This petition for certiorari has been filed within 90 days of the date of said judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), which states:

> "cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (1) by writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

Constitutional Provisions Involved

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people."

Statement of the Case

This is an action instituted by the Middlesex County Utilities Authority (MCUA) in New Jersey Superior Court alleging breach of contract by defendant Borough of Sayreville and seeking injunctive relief to compel action by the individual defendants in their capacity as the voting members of the Borough Council with authority to enact ordinances. It was alleged that the Borough had breached a contract with MCUA under which it was required to obey all pertinent federal regulations necessary for MCUA to obtain funding for the building of a waste water treatment facility which would handle the sewerage from Sayreville and numerous other municipalities in the region.

Defendants filed a third party Complaint against William French Smith, Attorney General of the United States, and various other federal defendants alleging that the requirement that recipients of federal funds utilize a special tax solely for the purpose of raising the funds needed to meet its obligations to provide adequate funding for the operation of a waste water facility built with federal monies was unconstitutional in that it violated the Tenth Amendment reservation of powers to the States. The third party federal defendants then had the matter removed to the United States District Court for New Jersey pursuant to 28 *U.S.C.* §1441(a) and 28 *U.S.C.* §1446.

The Borough of Sayreville has never contested its obligation to pay its fair share of MCUA's costs of operating the facility. Unlike other municipalities, Sayreville has more than adequate funds available to it from already existing taxes to meet its obligation in full without imposing additional, unneeded levies on its citizens, and has in fact always made its payments in a timely fashion. Nevertheless, although the administrator of the Environmental Protection Agency (EPA) in 1976 approved MCUA's grant

application, four years later, after advancing 80% of the promised funds, EPA suspended further payments. The reason given was that Sayreville and one other municipality serviced by MCUA, Milltown, had not adopted ordinances providing for user charges as per 33 *U.S.C.* §1284 (b)(1) [§204(b)(1) of the Federal Water Pollution Control Act (FWPCA)].

Both the federal third party defendants and plaintiff MCUA made motions for summary judgment in the United States District Court. Judge Debevoise granted the third party defendants' motion, upholding the constitutionality of the FWPCA requirement and thereby dismissing the case as to them. However, he refused to rule on the motion by MCUA and remanded that portion of the case to New Jersey Superior Court. Judgment was subsequently rendered in the New Jersey court requiring Sayreville to pass the appropriate ordinance, and the Appellate Division of Superior Court affirmed. Sayreville has filed a petition for certification with the New Jersey Supreme Court.

On appeal from that portion of the District Court Order granting summary judgment in favor of the third party defendants, the Third Circuit affirmed the judgment of the District Court.*

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* Apart from the Tenth Amendment argument presented by this petition, Sayreville also raised the claim of denial of equal protection of the law. That claim is not being urged before this Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to determine whether the Tenth Amendment is violated when the federal government requires a municipality or other unit of local government to enact a tax to raise monies not needed by the municipality.

It is well settled that Congress is not in possession of unbridled authority to exercise its powers in a manner which will unduly interfere with powers reserved to the States under the Tenth Amendment. That limitation has been clearly expressed by this Court in its decision in *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976). At issue therein was the constitutionality of 1974 amendments to the Fair Labor Standards Act, 29 *U.S.C.* §201 *et seq.* In those amendments, Congress extended minimum wage and maximum hour provisions to virtually all public employees of the States and their political subdivisions. The amendments were passed as an exercise of Congress' powers granted by the Commerce Clause of the Constitution, Article I, Section 8, Cl. 3.

The Court, recognizing that the Commerce Clause is "a grant of plenary authority to Congress," nonetheless further agreed with the appellants in *National League of Cities* that the commerce power is limited by other affirmative expressions of rights guaranteed by the Constitution. 96 S.Ct. at 2469:

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. 96 S.Ct. at 2470.

The Court specifically rejected *dicta* from *United States* v. *California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936) which totally denied the authority of a State to challenge an exercise of Commerce Clause authority. 96 S.Ct. at 2475-2476. This led the Court to overrule its earlier decision in *Maryland* v. *Wirtz*, 392 U.S. 183, 888 S.Ct. 2017, 20 L.Ed. 2d 1020 (1968) which had upheld extension of the Fair Labor Standards Act to employees of state hospitals, institutions and schools.

In *Fry* v. *United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed. 2d 363 (1975), it was stated:

> While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' *United States* v. *Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 885 L.Ed. 609 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system . . . 95 S.Ct. at 1795-1796, n.7.

Because the Court in *National League of Cities* concluded that the amendments impaired the ability of the States to effectively function in a federal system, they were held to not be within the authority granted Congress by the Commerce Clause. The Court expressly declined to render an opinion as to whether such limitation might be imposed under the authority granted to Congress as the Spending Power, Article I, Section 8, Clause 1. 96 S.Ct. at 2474, n. 17. However, other decisions have explicitly recognized that the Spending Power is also subject to limitations. In *Charles C. Steward Machine Company* v. *Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937), the Court upheld provisions of the Social Security Act under which in States

choosing to enact unemployment compensation legislation, a state taxpayer contributing to an unemployment fund may receive credit against federal taxation. Although finding that there was no contravention of the Tenth Amendment in that case, the Court did declare that it would be possible for Congress to enact taxing legislation designed to stimulate or discourage certain conduct which would unduly intrude upon the powers reserved to the States and exceed the bounds of power granted to Congress. 57 S.Ct. at 892. That expression of limitation on the power of Congress has been repeatedly reiterated by the Court. *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed. 2d 1 (1974); *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 1540 n. 13.

It is thus apparent that whether the challenged portions of the FWPCA be deemed to have been enacted under the Commerce Clause or under the Spending Power, they are subject to challenge as being beyond the proper boundaries of either of those powers as granted to Congress in the Constitution. It is submitted that by requiring a municipality to enact a particular form of tax, in this instance a user fee, Congress and the EPA, through its regulations implementing the statute, have impermissibly infringed upon the rights reserved to the States by the Tenth Amendment.

Recently, this Court articulated the standards to be applied in determining whether federal legislation violates the Tenth Amendment in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 265, 101 S.Ct. 2352, 69 L.Ed. 2d 1 (1981). These requirements were enunciated:

> First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are in-

> disputably 'attributes of state sovereignty.' And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'
>
> 101 S.Ct. at 2366 (citations omitted).

All of these requirements were taken by the Court from language in the *National League of Cities* decision.

In its decision below, the Third Circuit did not really dispute that Sayreville had met the first two of the *Hodel* requirements:

> Because the challenged condition relates to the ways in which Sayreville and other affected state subentities are to raise and allocate revenues, it arguably addresses 'States as States' and in relation to 'attributes of state sovereignty.'
>
> 690 F.2d at 364.

That the user fee requirement regulates the "States as States," and addresse "attributes of state sovereignty," seems beyond challenge. The power to tax has been reserved to the States without any limit except those expressed in the Constitution such as lack of power to tax exports. In *National League of Cities,* the Court had occasion to cite to *Lane County* v. *Oregon,* 7 Wall, 71, 19 L.Ed. 101 (1869) for its statement on the federal structure of our govenment. That decision also establishes that the power to tax is one of the powers contemplated by the Tenth Amendment as having been reserved to the States.

> *Now, to the existence of the States, themselves, necessary to the existence of the United States, the power of taxation is indispensable. It is an essen-*

tial function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments. Under the Articles of Confederation the Government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture or use, was acknowledged to belong exclusively to the States, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the National Government, and subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports or imports, except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business and persons, within their respective limits, their power of taxation remained and remains entire. It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. *The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the Legislatures to which the States*

> *commit the exercise of the power.* That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. *There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation.*
>
> 7 Wall. 76-77 (emphasis added).

The conclusions drawn in the *Lane County* decision have never been overturned, and in fact recent court decisions have reiterated that the power to tax is protected by the Tenth Amendment. In *City of Sault Ste. Marie* v. *Andrus,* 458 F.Supp. 465 (D.D.C. 1978), it was held that "the power to levy a property tax is one of those powers reserved to the states by the Tenth Amendment" and that such power may be delegated to a municipality. 458 F.Supp. at 473. In *Snow* v. *Dixon,* 66 Ill. 2d 443, 363 NE 2d 1052 (1977), *cert.* den. 434 U.S. 939, 98 S.Ct. 429, 52 L.Ed. 2d 298, it was recognized that matters of state taxation are reserved to the States by the Tenth Amendment and are unrestricted if not otherwise unconstitutional. 362 NE 2d at 1062.

The Third Circuit rejected Sayreville's claim on the basis of its conclusion that there was no interference with the freedom to "structure integral operations in areas of traditional governmental functions" because Sayreville need not apply for federal funds. 690 F.2d at 364. This conclusion was reached in reliance upon the generally accepted rule that the federal government may fix the terms on which it disperses money to the States. *Pennhurst State School and Hospital* v. *Halderman,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed. 2d 694 (1981); *FERC* v. *Mississippi,* —— U.S. ——, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982). It is submitted that while the above cited cases do in-

dicate that Congress may normally attach conditions to grants of federal money, they also recognize that such power is not without limits, and this case presents facts which call for an application of those limits.

In the *Pennhurst* decision, Justice Rehnquist noted the limits on Congress' Spending Power:

> . . . legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' 101 S.Ct. at 1539.

The key word for the purpose of this case is "voluntarily." It is submitted that the Third Circuit erred in accepting at face value the argument that it is entirely up to municipalities to reject federal funds or accept them and therefore agree to comply with the user fee requirements. In *Pennhurst State School* and the cases cited therein, the statutes in question involved the government offering money to States who met certain conditions as an incentive to meet those conditions. However, if the States chose not to accept the money, they were under no obligations. That is not the case under the Federal Water Pollution Control Act. Theoretically, a State or local governmental entity could avoid the need for instituting a user charge by not seeking federal grant funds for construction of treatment works. This possibility exists in theory only and is in no way representative of reality.

Totally apart from whether federal grant funds are sought, this statute imposes obligations on States and

municipalities which must be met. In *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977), it was argued that publicly owned sewage treatment plants which have not received any federal grants need not meet effluent limitations imposed by §301(b)(1) of the FWPCA [33 *U.S.C.* §1311(b)(1)]. That notion was completely rejected by the court.

> . . . effluent limitations are, on their face, unconditional; and no other provision indicates any link between their enforceability and the timely receipt of federal assistance.
>
> 559 F.2d at 924.

This conclusion was echoed by Judge Debevoise in *City of New Brunswick* v. *Borough of Milltown*, 519 F. Supp. 878 (D.N.J. 1981), aff'd 686 F. 2d 120 (3rd Cir. 1982):

> Its [MCUA] obligation to comply with the treatment and discharge requirements of the Clean Water Act is completely independent of the receipt of any financial assistance from the government.
>
> 519 F.Supp. at 885.

The court in *State Water Control Board* went on to discuss the difficulties in financing construction of needed water treatment facilities:

> To assist in financing the facilities necessary to accomplish the effluent reduction mandated by Section 301, Title II of the Act establishes a program of federal grants to states, municipalities and intergovernmental agencies for the construction of publicly owned treatment plants. Section 202(a) provides that the amount of any grant made under this program shall be 75% of approved construction costs;

> and Section 207 authorizes the appropriation of $18 billion for fiscal years 1973 through 1975 for such grants.
>
> Unfortunately, however, the grant program's effectiveness in facilitating compliance with the 1977 effluent limitations has been limited. Grants have not been available for many construction projects because the money authorized by Section 207 is insufficient to finance 75% of the cost of every needed sewage treatment plant in the country. Moreover, disbursement of the authorized funds has been substantially delayed by Presidential impoundment and by the time consumed by administrative processing of grant applications. *These problems, together with the fiscal difficulties now confronting most State and local governments, have made it economically impossible for many localities to accomplish the required effluent reductions by the 1977 deadline.* 559 F.2d at 923-924 (emphasis added) (footnotes omitted).

It is clear from the above quotation that it has been difficult if not impossible for many States and municipalities to meet the requirements imposed by the FWPCA even with federal grant money, and so to argue that it is realistic for Sayreville, MCUA or any other State or local government to comply with the statute without applying for grant money is to ignore all notions of practicality. The FWPCA simply does not allow a municipality such as the Borough of Sayreville to evade the currently existing clean water standards in the statute by declining to request federal funds.

Given the conclusion in the *State Water Control Board* decision, it would be grossly unfair to apply the doctrine that the federal government may freely tie conditions to

the disbursement of federal money. The case most generally relied upon for that proposition is *State of Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947). At issue therein was the constitutionality of the Hatch Act, 18 *U.S.C.* §61 et seq. Specifically questioned was the provision which barred any officer or employee of a State or locality whose principal employment was in connection with an activity financed in whole or part by loans or grants from the United States from taking an active part in political management or political campaigns. There was a total lack of any affirmative obligations placed on a recipient of federal funds. Oklahoma was totally free to reject federal funds and keep the particular employee involved as Highway Commissioner. The only penalty was the loss of highway grant funds equivalent to the salary payments to this employee. That situation is a far cry from deciding whether or not to meet the conditions for receipt of federal funds needed to comply with binding requirements which involve the expenditure of untold millions.

Other cases which may be cited in support of this principle are equally distinguishable. *State of North Carolina ex. rel. Morrow* v. *Califano,* 445 F.Supp. 532 (E.D.N.C. 1977), aff'd 435 U.S. 962, 98 S.Ct. 1597 (1978) dealt with the National Health Planning and Resources Development Act of 1974, 42 *U.S.C.* §300k et seq. That statute made federal funds available to States which agreed to establish a health planning and development agency to administer a state health program requiring usage of a certificate of need. The North Carolina Supreme Court held that such a program could not be implemented in North Carolina without an amendment to the state constitution. North Carolina then challenged the statute arguing that it was being coerced to comply. It did not challenge the general rule that the federal government may attach conditions to the grant-

ing of funds, but argued that the need to amend its state constitution constituted coercion "under the unique circumstances applicable to it." 445 F.Supp. at 535. The court rejected this argument noting that its acceptance would allow states to evade otherwise valid conditions by obtaining a state court decision similar to the one in North Carolina thus leaving enforcement of the conditions to the quirks of local law. What is significant is that the federal statute was one devoid of any compulsion in the form of action that a State must take even if it chooses to do without any federal funding. See *Greater St. Louis Health Systems Agency* v. *Teasdale,* 506 F.Supp. 23 (E.D. Mo. 1980).

Texas Landowners Rights Association v. *Harris,* 453 F. Supp. 1025 (D.D.C. 1978), aff'd 598 F.2d 311 (D.C. Cir.) *cert. den.* 444 U.S. 927 (1979) dealt with the National Flood Insurance Program, 42 *U.S.C.* §4001-4128. Under that statute, federal assistance for a program of flood insurance would be denied unless localities participated in the federal program, which meant adoption of local flood plain management measures. The argument against the constitutionality of that statute amounted to no more than the statement that the plaintiffs would lose more by not participating than they would gain by becoming part of the program and so they were being unlawfully coerced. Once again, the statute made no demands on any local goverment which chose to forego receipt of a federal grant.

Nor can reliance be placed on the fact that protection of the environment is an important and legitimate federal concern. In the past, when the EPA has sought to order States to establish particular programs to meet federal specifications, three different Circuit Courts, all citing to the Tenth Amendment, found such action unconstitutional. *Maryland* v. *EPA,* 530 F.2d 215 (4th Cir. 1975), vacated and remanded *per curiam sub nom EPA* v. *Brown,* 431 U.S. 99

(1977); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded *per curiam sub nom EPA* v. *Brown*, 431 U.S. 99 (1977); *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated and remanded *per curiam*, 431 U.S. 99 (1977).* The only contrary decision, *Pennsylvania* v. *EPA*, 500 F.2d 246 (3d Cir. 1974), relied on the decision in *Maryland* v. *Wirtz*, *supra*, which was overruled in *National League of Cities*.

In *Brown* v. *EPA*, it was accepted by all parties and the court that Congress had full power to regulate air pollution, and from that the EPA argued that the power existed to direct a State to incorporate in its laws regulations designed to control air pollution properly promulgated by the Administrator of EPA. This was rejected on the grounds that the Commerce Power does not allow Congress to require a State to undertake governmental tasks. Reliance was placed on the language in *Fry* v. *United States*, *supra*, regarding the limitations on congressional power expressed in the Tenth Amendment. See 521 F.2d at 837-842.

In considering the same issue in *District of Columbia* v. *Train*, the District of Columbia Circuit addressed the language in *Fry* regarding the 'fashion" in which Congress exercises power that has been granted to it by the Constitution:

> In other words, the Tenth Amendment may prevent Congress from selecting methods of regulating

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* The three decisions vacated and remanded in *EPA* v. *Brown* were all on the basis of the controversies having become moot due to the repeal of certain EPA regulations and the concession that those remaining in controversy would be invalid unless modified.

> which are 'drastic' invasions of state sovereignty where less intrusive approaches are available.
>
> 521 F.2d at 994.

Requiring a State to enact statutes and regulations was found to be a "drastic" intrusion on state sovereignty.

In *State of Maryland* v. *EPA*, the court technically did not reach the constitutional issue, premising its decision on a statutory construction that EPA lacked the authority to require a State to pass legislation. Nonetheless, *Brown* v. *EPA* was cited approvingly, and commenting upon EPA regulations requiring Maryland to adopt statutes and regulations, the court said that "we are of opinion their constitutional validity is very doubtful at the very best . . ." 530 F.2d at 226.

In his concurring opinion in *National League of Cities*, Justice Blackmun indicated that an overriding federal interest such as environmental protection may outweigh what would otherwise be an impermissible infringement on the powers reserved by the Tenth Amendment. It is submitted that the three Circuit Court decisions which reached this Court in *EPA* v. *Brown, supra*, subsequent to *National League of Cities*, indicate that interest in environmental protection is not enough to allow the federal government to impose on the States in violation of the Tenth Amendment. While in *Hodel* this Court cited to Justice Blackmun's statement, it did so only for the general proposition that some federal interests might justify State submission notwithstanding the Tenth Amendment. See 101 S.Ct. at 2366, n. 29. As Justice O'Connor noted in her dissent in *FERC* v. *Mississippi*, the Court has not yet explored the circumstances that might justify an exception to the standards set forth in *Hodel*. 102 S.Ct. at 2147, n. 4.

A writ of certiorari should issue so that the Court can give content to Justice Rehnquist's indication in the *Pennhurst* case that there are limits to the constitutional ability of Congress to place conditions on a grant of federal funds. This case presents facts which call for the Court to indicate to the lower federal courts that they must not automatically uphold all Congressional action simply because it deals with federal funds.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: January 6, 1983

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5116

MIDDLESEX COUNTY UTILITIES AUTHORITY

v.

BOROUGH OF SAYREVILLE, et al.,
Appellants

v.

WILLIAM FRENCH SMITH,
UNITED STATES ATTORNEY GENERAL, et al.,

(D.C. Civil No. 81-2648)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted: July 30, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*
and POLLAK, *District Judge**

(Opinion Filed October 12, 1982)

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*Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

POLLAK, *District Judge*.

The Middlesex County Utilities Authority ("MCUA") is a public body established, pursuant to New Jersey law, by the Board of Freeholders of Middlesex County.[1] In 1954, MCUA entered into an Agreement with twenty-four municipalities and several industrial enterprises in Middlesex, Somerset and Union Counties, pursuant to which MCUA undertook to build and operate a trunk sewer system together with a sewage disposal plant to be located at Sayreville. With the adoption in 1972 of the Federal Water Pollution Control Act, more commonly known as the "Clean Water Act," MCUA, like

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1. The Authority was originally "Middlesex County Sewerage Authority," acquiring its current name, and the acronym "MCUA," just a few years ago. To simplify the terminology, all further references in this opinion will be to "MCUA," notwithstanding that some of the underlying events took place under the banner of the Sewerage Authority.

other public sewage treatment systems, became subject to comprehensive federal legislative prohibitions on discharging pollutants into waterways — prohibitions which, together with those applicable to private pollution sources, are intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a).

By 1975, it was apparent to MCUA that it would have to expand and modernize its trunk system and the Sayreville facility. To accomplish this, MCUA decided to apply to the Environmental Protection Agency (EPA) for a construction grant pursuant to Title II of the Clean Water Act, which, with a view to helping public sewage treatment systems achieve compliance with federal anti-pollution standards, authorizes the EPA Administrator to fund up to 75% of the cost of building or improving sewage systems. As a predicate for applying for a grant, MCUA and its customer municipalities and industries entered into a Supplemental Agreement amending the 1954 Agreement in the respects necessary "to obtain grants for the construction of wastewater facilities." Supplemental Agreement, p.2. Among the amendments were a provision that "[t]he Authority and each Municipality represents and agrees that it will adopt a system of user charges . . . which, at a minimum, complies with the rules and regulations of the EPA," and a companion provision obligating each municipality to "secure passage of a sewer use ordinance or resolution." Supplemental Agreement, pp. 4 and 5. These undertakings were intended to meet the directive of Section 204(b)(1) of the Clean Water Act that:

> . . . the Administrator shall not approve any grant for any treatment works . . . unless he shall first have determined that the applicant . . . has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the

Administrator, will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant . . .[2]

---

2. 33 U.S.C. §1284(b)(1).

In 1977, Section 204(b)(1) was amended to provide that

> In any case where an applicant which, as of December 27, 1977, uses a system of dedicated ad valorem taxes and the Administrator determines that the applicant has a system of charges which results in the distribution of operation and maintenance costs for treatment works within the applicant's jurisdiction, to each user class, in proportion to the contribution to the total cost of operation and maintenance of such works by each user class (taking into account total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors), and such applicant is otherwise in compliance with . . . this paragraph . . . then such dedicated ad valorem tax system shall be deemed to be the use charge system meeting the requirements . . . of this paragraph. . . .

A companion amendment provided:

> A system of charges which meets the requirement . . . of paragraph (1) of this subsection may be based on something other than metering the sewage or water supply flow of residential recipients of waste treatment services, including ad valorem taxes. If the system of charges is based on something other than metering the Administrator shall require (A) the applicant to establish a system by which the necessary funds will be available for the proper operation and maintenance of the treatment works; and (B) the applicant to establish a procedure under which the residential user will be notified as to that portion of his total payment which will be allocated to the cost of the waste treatment services.

The principal implementing regulations are the following provisions of 40C.F.R. §35.929-1:

> §35.929-1 Approval of the user charge system.
>
> The Regional Administrator may approve a user charge system based on either actual use under paragraph

Appendix A

In 1976, the Administrator approved MCUA's grant application, thereby committing EPA to pay 75% of the multi-million dollar sewage treatment improvement project. But four years later, after having advanced 80%

(a) of this section or ad valorem taxes under paragraph (b) of this section. The general requirements in §§35.929-2 and 35.929-3 must also be satisfied.

(a) *User charge system based on actual use.* A grantee's user charge system based on actual use (or estimated use) of waste water treatment services may be approved if each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total waste water loading from all users (or user classes). To insure a proportional distribution of operation and maintenance costs to each user (or user class), the user's contribution shall be based on factors such as strength, volume, and delivery flow rate characteristics.

(b) *User charges based on ad valorem taxes.* A grantee's user charge system (or the user charge system of a subscriber, i.e., a constituent community receiving waste treatment services from the grantee) which is based on ad valorem taxes may be approved if it meets the requirements of paragraphs (b)(1) through (b)(7) of this section. If the Regional Administrator determines that the grantee did not have a dedicated ad valorem tax system on December 27, 1977, meeting the requirements of paragraphs (b)(1) through (b)(3) of this section, the grantee shall develop a user charge system based on actual use under §35.929-1(a).

(1) The grantee (or subscriber) had in existence on December 27, 1977, a system of ad valorem taxes which collected revenues to pay the cost of operation and maintenance of waste-water treatment works within the grantee's service area and has continued to use that system.

(2) The grantee (or subscriber) has not previously obtained approval of a user charge system on actual use.

(3) The system of ad valorem taxes in existence on December 27, 1977, was dedicated ad valorem tax system.

of the promised federal funds. EPA suspended further payments. The reason for the suspension was that Milltown and Sayreville had not adopted ordinances providing for user charges. The suspension triggered two law suits, of which this is the second.

The *first* law suit involved Milltown. Milltown is a municipality whose sewage is handled by MCUA but

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NOTE. — (*Continued*)

(i) A grantee's system will be considered to be dedicated if the Regional Administrator determines that the system meets all of the following criteria:

(A) The ad valorem tax system provided for a separate tax rate or for the allocation of a portion of the taxes collected for payment of the grantee's costs of waste water treatment services;

(B) The grantee's budgeting and accounting procedures assured that a specified portion of the tax funds would be used for the payment of the costs of operation and maintenance;

(C) The ad valorem tax system collected tax funds for the costs of waste water treatment services which could not be or historically were not used for other purposes; and

(D) The authority responsible for the operation and maintenance of the treatment works established the budget for the costs of operation and maintenance and used those specified amounts solely to pay the costs of operation and maintenance.

(ii) A subscriber's system based on ad valorem taxes will be considered to be dedicated if a contractual agreement or a charter established under State law existed on December 27, 1977, which required the subscriber to pay its share of the cost of waste water treatment services.

(4) A user charge system funded by dedicated ad valorem taxes shall establish, as a minimum, the classes of users listed below:

(i) Residential users, including single-family and multifamily dwellings, and small nonresidential users, including nonresidential commercial and industrial users which introduce no more than the equivalent of 25,000 gallons per day of domestic sanitary wastes to the treatment works. . . .

which is not a signatory to the 1954 Agreement or the 1975 Supplemental Agreement. The explanation for this apparent paradox traces to the fact that Milltown has, since 1914, had a contract with its larger neighbor, New Brunswick, under which the latter has seen to the collection and disposal of Milltown's sewage. Since the 'fifties, New Brunswick, a signatory of both MCUA agreements, has paid for MCUA's treatment and disposal of both New Brunswick's and Milltown's sewage. Because Milltown is not a signatory of the MCUA Agreements, it did not regard itself as bound by the provisions of the Supplemental Agreement calling for adoption and implementation of a user charge ordinance. But EPA took the position that Milltown is a "recipient of waste treatment services" within the meaning of Section 204(b)(1) of the Clean Water Act and hence obliged to put a user charge system into effect. MCUA and Milltown not only challenged EPA's reading of the statute but argued that the statute so read would work an unconstitutional impairment of Milltown's 1914 contract with New Brunswick. Judge Debevoise rejected these contentions. *City of New Brunswick v. Borough of Milltown*, 519 F.Supp. 878 (D.N.J. 1981). And this court, speaking through Judge Garth, affirmed. City of *New Brunswick v. Borough of Milltown*, Nos. 81-2906 and 81-2907 (June 24, 1982).

The 1977 Amendment permitting "a system of dedicated ad valorem taxes" to be accepted by the Administrator in lieu of a user charge system has, up to the late stages of this litigation, been of no avail to Sayreville, because all parties have proceeded on the assumption that Sayreville had no such system in force on December 27, 1977, a statutory requirement which fuels Sayreville's "equal protection" claim considered in Part II of this opinion, *infra*. With respect to Sayreville's alternative contention, advanced very tentatively before Judge Debevoise and enlarged upon in its brief here (pp. 38-40), that it had a dedicated ad valorem tax in effect as of December 27, 1977, see Part III of this opinion, *infra*.

Appendix A

The *second* law suit — this one — involves Sayreville. Sayreville is a signatory to the 1954 and 1975 Agreements. In February of 1981, MCUA brought an action against Sayreville and the members of the Sayreville Borough Council in the New Jersey Superior Court, seeking to mandamus the defendants to adopt a sewer use ordinance in fulfillment of Sayreville's 1975 commitment to do so. Sayreville impleaded Attorney General Smith, EPA Administrator Douglas M. Costle, and various subordinate officers of EPA and the Department of Justice, alleging, evidently in reliance on the Tenth Amendment, that EPA in promulgating rules enforcing the user charge system requirement "usurped the powers and perogatives [*sic*] not only of the United States Congress but also of the individual sovereign states and the political subdivisions thereof . . .," and seeking damages or, in the alternative, "a declaration of the invalidity of the [EPA] rules. . . ." The federal defendants thereupon removed the litigation to the district court and moved for summary judgment dismissing the third-party complaint and declaring the validity of Section 204(b)(1) and its attendant regulations. MCUA moved for summary judgment against Sayreville. On December 1, 1981, Judge Debevoise entered an order which gave effect to a bench opinion delivered on November 16, 1981.[3] The order dismissed Sayreville's third-party complaint; declared that Section 204(b)(1) and the challenged regulations "are lawful and valid and authorize EPA to condition its award to MCUA of grant funds under Title II of the Clean Water Act . . . upon the requirement that MCUA assure that Sayreville adopt a system of sewer user charges . . .;" and, without ruling on MCUA's motion for summary judgment, remanded the balance of the case to the Superior Court.

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3. Judge Debevoise's bench opinion rested largely on his decision of a month before in *City of New Brunswick v. Borough of Milltown*, *supra*, which was subsequently affirmed by this court on June 24, 1982.

Appendix A

I.

On this appeal, Sayreville continues to press its claim that Congress by statute[4] and EPA by regulation[5] have breached the Tenth Amendment by conditioning the MCUA construction grant on MCUA's implementation of an undertaking to put into force a user charge system — i.e., a system of charges which, in the words of Section 204(b)(1), is designed "to assure that each recipient of waste treatment services within the applicant's jurisdiction . . . will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant. . . ." In Sayreville's view, a grant so conditioned is calculated to coerce Sayreville to introduce a superfluous tax rather than pay its share of MCUA's services out of its happily sufficient general revenues. To force Sayreville to adopt an uncongenial tax is, Sayreville submits, in contravention of Sayreville's slice of New Jersey's sovereignty.

We note in passing that MCUA — the public body to whom the federal grant was made, on whom the condition was imposed, and from whom federal funds are now being withheld — has not raised a Tenth Amendment claim on its own or even acquiesced in the claim advanced by Sayreville.[6] Whether or not MCUA would

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4. See text, *supra*, at n.2 for the pertinent language of Section 204(b)(1) as adopted in 1972; for the 1977 amendments, see n.2.

5. For the principal implementing regulation, see n.2, *supra*.

6. By contrast, in *City of New Brunswick v. Borough of Milltown*, *supra*, MCUA joined Milltown in challenging EPA's position. (EPA had determined that Milltown was, within the meaning of Section 204(b)(1) a "recipient of waste treatment services," notwithstanding that Milltown was not a signatory of either the 1954 or the 1975 Agreements and that New Brunswick, a signatory of both Agreements, was obliged by contract to take care of Milltown's sewage disposal requirements and did in fact pay MCUA to handle Milltown's sewage as well as its own.)

have had standing to raise this Tenth Amendment claim, we are satisfied that Sayreville — the municipality whose revenue system EPA seeks to modify through enforcement of the condition — does have the requisite standing. Accordingly, we turn to the merits of the claim. This necessitates a consideration of what Congress intended the challenged condition to accomplish, and — in the light of Congress' purposes — the degree to which the congressional constraint would curtail fulfillment of those central values of statehood vindicated in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The purposes subserved by the challenged condition are not obscure. Judge Debevoise in *City of New Brunswick v. Borough of Milltown, supra*, 519 F. Supp. at 883, found that his "interpretation of the [Clean Water] Act's user charge requirements and its implementing regulations [was] consistent with the underlying purposes and policies of the Act" for the following reasons:

> Legislative history reveals that Congress' purpose in providing for a user charge system was twofold: first, it was enacted "as a means of assuring that each federally assisted facility would have adequate operation and maintenance funds", and, second, the system was intended to be "a positive force in encouraging more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use". S.Rep.No. 95-370, 95th Cong., 1st Sess. (1977), *reprinted in* [1977] U.S.Code Cong. & Ad. News 4326, 4352.

This court concurred in Judge Debevoise's analysis. *City of New Brunswick v. Borough of Milltown, supra*, Nos. 81-2906, 81-2907, slip opinion at pp. 23-5. And this court went on, *id.*, at p. 25, to observe that Congress' action in 1977, amending section 204(b)(1) to authorize EPA to accept an ad valorem tax, if in place on

December 27, 1977, as an alternative to a user charge, had not " 'eviscerated' any conservation purpose to the user charge requirement" but was "intended simply to provide 'greater flexibility . . . for the assessment of user charges' [*U.S. Code Cong. & Ad. News* at 4352], and not to undermine the user charge concept itself of its underlying purposes."[7]

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7. See also p. 24 n.19 of this court's slip opinion in *City of New Brunswick v. Borough of Milltown*. For pertinent excerpts from the text of the 1977 amendments, see n.2 of this opinion, *supra*. The independent importance of the "conservation purpose" is underscored by the following colloquy in the court below between Judge Debevoise and counsel for Sayreville, just before Judge Debevoise delivered his bench opinion (App. pp. 45a-48a):

THE COURT: Why are all the other 24 municipalities able to to this and Sayreville can't?

MR. KARCHER: It benefits them to do it, but the Borough of Sayreville, it hurts us.

THE COURT: That's life. Some things hurt more or less as you go along, and you have a sewer system.

MR. KARCHER: We don't want the sewer system. We are host community to the largest cesspool-septic tank in the State of New Jersey. We really don't care, your Honor, if they would like to move it.

THE COURT: You signed the agreement.

MR. KARCHER: We signed the agreement, your Honor, saying that we would pay our bill, and we always have paid our bill. I have been in many courts where the issue was nobody did pay. Here we paid the bill, and they say not in the right fashion.

What we are talking about here, the one guiding light here is whether or not the federal statute set up one standard with one idea, and that was to make sure that the systems protect the fiscal integrity of the system. Sayreville is doing nothing to undermine the fiscal integrity of the system, willing to pay our fair share. Always have been.

THE COURT: That is not the issue in the case.

The issue, the Federal Government added something more, either user charge or dedicated *ad valorem* tax.

MR. KARCHER: We have had *ad valorem* tax.

The question is whether the challenged condition, which reasonably implements Congress' incontestably valid purposes, infringes upon the sovereignty of New Jersey in the persona of the Borough of Sayreville. In *Hodel v. Virginia Surface Mining & Reclamation Associ-*

NOTE — *(Continued)*

THE COURT: Not dedicated.

MR. KARCHER: The State of New Jersey doesn't — that shows the insensitivity of the federal Government.

THE COURT: Or lack of flexibility of the State of New Jersey.

MR. KARCHER: That may well be, your Honor, but furthermore, even if we were to do it now, going to pay, presuming the State of New Jersey would let us do it, if we passed *ad valorem* tax as Mr. Journick was saying, we don't have any municipal tax rate. In the Borough of Sayreville we don't tax on *ad valorem* to run the city. Don't have to.

THE COURT: All the more reason to have user tax.

MR. KARCHER: That is the reason we should not. Why impose on the widow who is living in her house a fee upon her which she doesn't have to pay? We can pay it out of general revenue. We do not have to impose that. . . .

* * *

The person I am here to protect is the homeowner who doesn't have to have this imposed on them. It is senseless; it is redundant, duplicative, and it is an expense, a tax that the taxpayer in Sayreville doesn't have to pay. It is, really the only issue is common-sensical. Why are they forcing us to tax people that we don't have to tax? In this day and age of all issues, I don't think anything could be more important, and it would perhaps — no case could be more graphic in demonstrating this insensitivity of bureaucracies where they are telling us we have to charge people for something, even though we have the money to pay it already and do pay it already.

THE COURT: That really is an option the Federal Government has, I would think, and they have given reasons for doing it, and it may work better or worse in different communities.

MR. KARCHER: We wouldn't be here and wouldn't be contending if they gave a reason.

ation, Inc., 452 U.S. 264, 287-88 (1981), the Court stated that:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.*, at 852.

Because the challenged condition relates to the ways in which Sayreville and other affected state sub-entities are to raise and allocate revenues, it arguably addresses "States as States" and in relation to "attributes of state sovereignty." But what the condition does not do is "directly impair" the freedom of states " 'to structure integral operations in areas of traditional governmental functions.' " It does not "directly impair" Sayreville's — let alone New Jersey's — freedom at all. What the condition does is to state a limitation on the expenditure of federal funds — funds which, as MCUA

THE COURT: They did give a reason, a user charge is useful in impressing upon people from the large utilities to the widow in her home the desirability of not using the sewage facilities so extravagantly. Keep the water flow down. Keep budgeting your dishwashing all the rest. That is the theory behind it, as I understand it.

MR. KARCHER: I don't see that, your Honor. What I see is the purpose to provide that it be a pay-as-you-go fiscal integrity of the system be guaranteed.

THE COURT: That is another reason.

notes in its brief, "MCUA and its constituent municipalities were free not to apply for."[8]

In *City of New Brunswick v. Borough of Milltown*, *supra*, this court observed: "As a general rule, it is clear that 'Congress may fix the terms on which it shall disburse federal money to the States.' *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *see King v. Smith*, 392 U.S. 309, 333 n.34 (1968). Moreover, while that power is not without limits, *see* 451 U.S. at 17 n.13, it is indisputable that the power to fix terms lies essentially with the Congress, and not with the federal courts." Slip opinion, pp. 27-8. *In FERC v. Mississippi*, 102 S.Ct. 2126, 2141 (1982), the Supreme Court had recent occasion to develop the same theme, in terms which are dispositive of Sayreville's Tenth Amendment claim:

> [T]he Court has recognized that valid federal enactments may have an effect on state policy — and

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8. P. 10. Both MCUA (Brief pp. 10-11) and Sayreville (brief p. 15) recognize that, as the Fourth Circuit held in *State Water Control Board v. Train*, 559 F.2d 921, 924 (1977), the obligation of sewage authorities to comply with federal effluent standards is independent of the entitlement of such authorities to seek federal funding to facilitate compliance. Both MCUA and Sayreville assert in their briefs that in practice compliance cannot be achieved without federal funds. (MCUA brief pp. 10-11) (Sayreville brief, pp. 15-17). Since the parties did not undertake to make a record on this issue below, we have no basis for determining whether the MCUA-Sayreville assertions are well founded. If, in another case, that issue were tendered, the question might arise whether the Tenth Amendment challenge was properly directed not at the user charge/ad valorem tax requirement but at the obligatory effluent standards themselves. In such a context, even if all three of the *Hodel* criteria were met, the gravity of the federal interest would have to be factored in. 452 U.S. at 288 n. 29. And compare Justice Blackmun's emphasis, in his concurrence in *National League of Cities v. Usery*, on the non-applicability of that ruling "in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856.

> may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority. Thus in *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947), the Court upheld Congress' power to attach conditions to grants-in-aid received by the States, although the condition under attack involved an activity that "the United States is not concerned with, and has no power to regulate." *Id.*, at 143, 67 S.Ct., at 553. The Tenth Amendment, the Court declared, "has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,' " *ibid*, quoting *United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609 (1941) — the end there being the disbursement of federal funds.

As the Chief Justice made plain, speaking for the unanimous Court in *United Transportation Union v. Long Island Railroad Company*, 102 S.Ct. 1349, 1354-55 (1982), what *National League of Cities v. Usery* requires of a court seized of a Tenth Amendment claim is to conduct "an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.' " We hold that the federal regulation challenged here does not impinge on New Jersey's sovereignty.

II.

As an alternative to its Tenth Amendment claim, Sayreville argues that in lieu of adopting a user tax, as Sayrevile promised to do in the 1975 Supplemental Agreement, it should be permitted to satisfy EPA's re-

quirements through an ad valorem tax dedicated to sewage costs. That option would have been open to Sayreville under the 1977 amendments to Section 204(b)(1), provided Sayreville had had a dedicated ad valorem tax in force as of December 27, 1977. Sayreville argues that distinguishing between communities which had a dedicated ad valorem tax in force in 1977 and those communities which, like Sayreville, were thereafter prepared to adopt such a tax, deprives the latter group of "the equal protection of the laws."[9]

The federal defendants argue that Sayreville should not be heard to raise an equal protection claim here, because it made no such claim in the district court. As a general matter, this court will not entertain claims not made below. However, while not condoning Sayreville's failure to bring all its federal claims to Judge Debevoise's attention, we are reluctant to conclude that this municipality, representing the aggregate interests of its inhabitants, is thereby foreclosed from presenting to this court what it perceives as a serious constitutional claim. Therefore, we turn to an examination of the genesis of the 1977 amendments in order to determine whether Congress' limitation of ad valorem taxes to those in force in 1977 had some rational foundation.

As this court pointed out in *City of New Brunswick v. Borough of Milltown*, *supra*, slip opinion at p. 24 n.19, EPA regarded dedicated ad valorem taxes as satisfying Section 204(b)(1) as originally written, but the Comptroller General in a 1974 ruling disagreed, concluding that a typical ad valorem tax would not adequately advance the statute's "conservation purpose." 54 Comp.

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9. Sayreville characterizes this claim as one arising under the Fourteenth Amendment. But since the constitutional challenge is directed not at a state but at the United States, the Fifth Amendment, which does not speak *in haec verba* of equal protection but which incorporates equal protection principles in due process of law, *Bolling v. Sharpe*, 347 U.S. 497 (1954), would appear to be the relevant source of Sayreville's claim.

Gen. 1. Accordingly, when Congress, in 1976, took up proposals to amend the Clean Water Act, one of the items pressed by EPA Administrator Russell E. Train was liberalization of Section 204(b)(1). By letter of April 17, 1976 to Chairman Robert E. Jones of the House Committee on Public Works and Transportation, Mr. Train made the following recommendations under the heading "User Charges" (Brief for Federal Defendants, appendix C):

> *User Charges*
>
> H.R. 9560 would amend section 204(b) of the Federal Water Pollution Control Act to allow municipalities to use an ad valorem tax for funding operation and maintenance costs.
>
> Unless an amendment to section 204 is enacted, the decision by the Comptroller General that ad valorem taxes are not a proper basis for levying user charges will have a severe impact on the implementation of the construction grant program as well as upon municipal compliance with the requirements of the Act.
>
> Numerous cities and districts, including many large metropolitan areas, presently finance operation and maintenance costs through ad valorem taxes. Considering the substantial costs involved, many of these cities are understandably unwilling to revise their systems. Moreover, in those cases where there is willingness to comply with the requirements of section 204(b)(1), the compliance will cause considerable delays before we accomplish any measure of progress in waste treatment plant construction.
>
> As you know, the Environmental Protection Agency has also made a proposal to amend this section. The principal difference between the two amendments lies in the eligibility of municipalities

to apply this tax. Our proposal would limit the use of the ad valorem tax to those municipalities where sewage treatment costs have traditionally been paid through such a user charge system and where a change to a direct charge would be inordinately disruptive. H.R. 9560, on the other hand, does not apply such limitations.

We believe that federally assisted sewer systems involving new collections systems should not use ad valorem tax as a matter of course to serve as a basis for assessing user charges. We, therefore, support the ad valorem user charge, but believe its application should be limited to historical use of this tax by municipalities or to instances where direct user charges would be inordinately disruptive.

As the legislative process went forward, EPA continued to support enlargement of Section 204(B)(1) to encompass ad valorem taxes, but also continued to couple this with insistence that the ad valorem tax — a tax less well attuned to the "conservation purpose" than a user charge geared precisely to the amount of sewage generated — be one which was in "previous use . . . and that we do not in any way indicate to any community that ad valorem system can now be implemented as a substitute for user charges. It must be one that is presently supporting the O.&M. [operation and maintenance] expense." Testimony of Assistant Administrator Thomas J. Jorling, *Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess., p. 1126. See generally *id.* at 439, 549, 1284, 1288, 1296, 1297, 1307-09, 1358-60.

As adopted, the 1977 amendment to Section 204(b)(1) followed EPA's strong submission that ad valorem taxes should be sanctioned only where they were already in place and utilized for, *inter alia*, sewage charges. That this was a rational limitation seems hardly open to debate. Accordingly, it is a limitation which is proof against Sayreville's "equal protection" challenge.

III.

Finally, Sayreville argues here (brief, pp. 38-40) a position very tentatively urged before Judge Debevoise on November 16, 1981 (App. 48a-49a) — namely, that Sayreville in 1977 did have in force what EPA, under the 1977 amendments and the implementing regulations, could regard as a dedicated ad valorem tax. Judge Debevoise did not deal with this quasi-contention — presumably for the very good reason that it had never been communicated to EPA so there was no administrative determination to review. See App. 36a-37a, 49a. On April 22, 1982 — a week after filing its brief here — counsel for Sayreville wrote to the Regional Administrator of EPA and the Raritan Basin Manager of the New Jersey Department of Environmental Protection. The burden of the letter was to argue that, in light of Sayreville's contractual commitment to pay MCUA for sewage services pursuant to the 1954 and 1975 Agreements, Sayreville's existing taxes constitute dedicated ad valorem taxes, in force as of December 27, 1977, within the meaning of Section 204(b)(1) as amended and the implementing regulations. Whether that submission has merit is a matter which should be considered in the first instance by EPA, not by a court of appeals.

CONCLUSION

For the foregoing reasons, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5116

MIDDLESEX COUNTY UTILITIES AUTHORITY,

vs.

BOROUGH OF SAYREVILLE, and JOHN E. CZERNIKOWSKI, MAYOR and RANIERO TRAVISANO, KENNETH W. BUCHANAN, SR., WILLIAM JACKSON, JOSEPH M. KEENAN, JR., THOMAS R. KUBERSKI, FELIX WISNIEWSKI, as members of the Borough Council of the Borough of Sayreville, Defendants Third Party Plaintiffs,

Appellants

vs.

WILLIAM FRENCH SMITH, United States Attorney General, DOUGLAS M. COSTLE, Administrator, United States Environmental Protection Agency, CHARLES WARREN, Regional Administrator, Region II, United States Enviornmental Protection Agency, RICHARD T. DEWLING, Acting Regional Administrator, Region II, United States Environmental Protection Agency and WILLIAM ROBERTSON, United States Attorney, Newark, New Jersey

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Appendix B

(D.C. Civil No. 81-02648)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: Gibbon and Hunter, *Circuit Judges*; and Pollak, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on July 30, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 8, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

SALLY MAVOS
Clerk

October 12, 1982

Certified as a true copy and issued in lieu of a formal mandate on November 15, 1982.

Test: M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit Denying Motion for Stay of Mandate and Affirming Judgment of the District Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5116

MIDDLESEX COUNTY UTILITIES AUTHORITY,

vs.

BOROUGH OF SAYREVILLE, et al.,
Appellants,

vs.

WILLIAM FRENCH SMITH, etc., et al.

(D.C. Civil No. 81-02648)

Present: Gibbon and Hunter, *Circuit Judges*; and Pollak, *District Judge.**

Upon consideration of the Motion by Appellant for Stay of the Mandate and the Answers thereto in the above-entitled case,

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* Sitting by designation.

Appendix C

It is ORDERED that the Motion to stay the mandate be and hereby is denied.

By the Court,

/sgd/ JOHN J. GIBBONS
Circuit Judge

APPENDIX D

Transcript of Opinion of Debevoise, U.S.D.J. dated November 16, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 81-2648

MIDDLESEX COUNTY UTILITIES AUTHORITY,
Plaintiff,

vs.

BOROUGH OF SAYREVILLE, et al.,

vs.

WILLIAM FRENCH SMITH, etc., et al.

November 16, 1981
Trenton, New Jersey

Before:

The Honorable Dickinson R. Debevoise, U.S.D.J.

Appearances:

Wilentz, Goldman & Spitzer,
For the Plaintiff,
By: Francis X. Journick, Esq.

Appendix D

Alan J. Karcher, Esq.,
For Defendant-Third Party Plaintiffs

Roseann Mayer, Esq., Departmentof Justice.

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(2)* Hearing on Plaintiff's Motion for Summary Judgment.

Hearing on Motion of Third Party Defendants for Summary Judgment on the Third Party Complaint and/or Dismissal of Certain Claims on Third Party Complaint.

The Court: Plaintiff, Middlesex County Utilities Authority, is a regional sewage treatment authority organized under NJSA 40:14B-1, and defendant-third party plaintiff, Borough of Sayreville, is one of the Authority's 25 participating municipalities pursuant to a February 5, 1954 agreement. The parties to the 1954 agreement executed a Supplemental Agreement on December 5, 1975, under which the Authority would obtain United States Environmental Protection Agency funds to help finance a Trunk System Improvement Project. To qualify the Project for Federal funding, all 25 municipalities agreed, among other things, to adopt user charges and sewer use ordinances that complied with EPA regulations. See December 5, 1975 Supplemental Agreement, Section 5(G)-(H).

At some point in mid-1980, EPA cut off Project funding at approximately 80% of total, due to the failure of Sayreville and other participating municipalities to comply

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* Numerals in parentheses refer to pages in the stenographic transcript.

with those EPA regulations. Subsequently, the Authority brought a breach of contract action in the New Jersey Superior Court (3) seeking to compel Sayreville to adopt user charge and sewer use ordinances which would comply with the EPA regulations.

Sayreville then brought a third party action against a number of federal officials who will be referred to collectively as the EPA asserting: (1) that the EPA regulations relied on by the Authority are invalid as arbitrary, unreasonable, and beyond EPA's statutory power; (2) that the regulations usurp both congressional and state power, rendering them null and void, and (3) that enforcement of the EPA regulations will damage Sayreville through lost state aid.

The United States then removed the entire action pursuant to 28 USC Section 1441(a). Although the removal petition does not expressly state a basis for this Court's jurisdiction, the third party complaint names officers of the United States as defendants, and Sayreville has purported to raise a Federal question by challenging the validity of the EPA regulations. The United States subsequently counterclaimed against Sayreville, seeking a declaration that the regulations are valid.

The matter is now before the Court on the Authority's motion for summary judgment against Sayreville and also on EPA's motion for summary judgment on the third party complaint and on EPA's counterclaim.

Sayreville has not specified which EPA regulations it (4) challenges, but the affidavit of Francis X. Journick identifies them as 40 CFR 35.965-18 and 40 CFR 65.929. The EPA Administrator promulgated these regulations to implement Section 204(b)(1) of the Federal Water Pollu-

tion Control Act Amendments of 1972, 13 USC Section 1284(b)(1). Section 204(b)(1) prohibits the EPA Administrator from approving any grants under the Act to applicants whose participating members have not adopted proportional charge or user charge systems.

In enacting grant programs, Congress may place reasonable conditions on award of funds, as long as the conditions are unambiguous and tend to advance the purposes of the programs. *See Pennhurst State School and Hospital* v. *Halderman,* 49 USLW 4363, 4366; *Rosado* v. *Wyman,* 397 U.S. 397 (1970); *King* v. *Smith,* 329 U.S. 309 (1968). The Act, like other Federal-State cooperative programs, is voluntary and States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of Federal funding. *See Pennhurst* v. *Halderman, supra.*

In *City of New Brunswick* v. *Borough of Milltown,* 519 F.Supp. 878 (D.N.J. 1981), which involved a dispute arising out of the same agreement as does the present dispute, I considered Section 2-4(b)(1)'s user charge requirement:

> "Legislative history reveals that Congress' purpose in providing for a user charge system was (5) twofold: first, it was enacted 'as a means of assuring that each federally-assisted facility would have adequate operation and maintenance funds,' and, second, the system was intended to be 'a positive force in encouraging more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use.' Requiring each participating municipality to pay for its proportionate share for the cost of operation and maintenance for the MCUA facility clearly furthers

the joint objectives of conservation and financial security." At page 883.

I have already held in that case that Section 402(b)(1) of the Act is a valid exercise of legislative authority.

Section 501(a) of the Act, 33 USC Section 1361(a), authorizes and Section 204(b)(2) of the Act, 33 USC Section 1284(b) (2) requires the EPA Administrator to issue guidelines and regulations necessary to implement Section 204(b)(1)'s user charge requirement. Therefore, since the Administrator possesses statutory power to issue regulations, and he has done so under Section 204(b)(1), itself a valid provision, the only remaining question is whether those regulations challenged by Sayreville are appropriate for implementation of that section.

The first regulation challenged at 40 CFR 35.929-1 (6) outlines two acceptable methods of establishing user charge systems, one based on actual use and the other based on a dedicated *ad valorem* taxing system. These are simply guidelines for acceptable user charge systems, leaving to each municipality the responsibility of drafting a specific ordinance to meet its own needs or purposes. This regulation outlines what type of systems will meet Section 204 (b)(1)'s requirement, and hence is necessary to its implementation.

The second regulation challenged, 40 CFR 35.935-13, directs the Administrator to halt funding at 80% of the total grant until he has approved an applicant's user charge system. This regulation provides a flexible method of policing compliance with Section 204(b)(1) and the applicable regulations. It allows an applicant's participating municipalities time to draft, revise and adopt their own user

charge ordinances without unnecessarily delaying the start of construction. It also allows the Administrator to halt funding at some point in order to insure that each municipality will honor its promise to adopt complying ordinances. This regulation is flexible, yet a reasonable means to insure that applicants comply with Section 204(b)(1)'s user charge system requirement.

Based on these findings, I hold that the Administrator validly exercised his authority and mandate to implement (7) Section 204(b)(1), which is itself a valid provision of the Act. Therefore, the United States is entitled to summary judgment on the third party plaintiff's challenge to the validity of the regulations, and it is entitled to summary judgment on its counterclaim. Costs will be allowed.

Having decided that, I will not decide the summary judgment motion of the Authority and will remand the matter back to the State Court, which I have discretion to do, since, as I see it, we are dealing, or the rest of the case deals with contract claims and the power of municipalities of New Jersey, both of which I think are peculiarly suitable for decision by the State Court. It should not delay matters excessively, since there was a summary judgment motion pending before Judge Cohen.

Mr. Journick: That is right.

The Court: I would think the papers simply could be transferred back to him, together with what is filed here.

Mr. Journick: We will renew the motion in the State Court.

May I ask at least for the record, so we can clean up everything; would we take the MCUA motion for summary judgment as being denied without prejudice, in view of the remand?

The Court: No, I think not. I am just not going to deal with it. I think that would be better. I think it (8) would

be a little inconsistent to deny it or to do anything with it, in view of the fact I really think the State Court ought to deal with it.

Maybe the United States will prepare an order which will both grant your motion for summary judgment, deny Sayreville's motion for summary judgment, not decide the other one, and remand the case back to the State Court.

Ms. Mayer: I am not sure Sayreville had a motion for summary judgment.

Mr. Karcher: We didn't. We were not that presumptuous.

Mr. Journick: May I suggest that I draw the order, considering the distance, and I will submit it counsel for review?

I would like to get back to the State Court.

The Court: I can see why you want the matter decided.

Thank you very much.

Ms. Mayer: Will there be a copy of your opinion circulated?

The Court: If you order one.

APPENDIX E

Order of Debevoise, U.S.D.J., Dismissing the Third Party Complaint on Summary Judgment and for Remand to the Superior Court of New Jersey, Chancery Division, Middlesex County, dated December 1, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 81-2648

MIDDLESEX COUNTY UTILITIES AUTHORITY,

Plaintiff,

vs.

BOROUGH OF SAYREVILLE, et al.,

Defendants-Third Party Plaintiffs,

vs.

WILLIAM FRENCH SMITH, etc., et al.

Third Party Defendants.

This mater having been opened to the Court on November 16, 1981, upon the Motion of plaintiff, Middlesex County Utilities Authority (hereinafter "MCUA"), for Summary Judgment and upon the Cross Motion of Third Party Defendants, William French Smith, et al. (herein-

after collectively "EPA"), for Summary Judgment dismissing the Third Party Complaint and/or for alternative relief, and the Court having considered the briefs, affidavits, pleadings and other papers filed in connection therewith, and having rendered an oral opinion from the bench, and sufficient good cause appearing,

IT IS ON THIS 1st day of December, 1981,

ORDERED as follows:

1. EPA's Cross Motion for an Order of Summary Judgment

a) In EPA's favor dismissing the Third Party Complaint of defendants-third party plaintiffs, Borough of Sayreville, et al. (hereinafter collectively "Sayreville"), be and the same is hereby granted, and

b) Declaring that Section 204(b)(1) of the Clean Water Act, 33 U.S.C. §1284(b)(1), and 40 C.F.R. §35.929-2(e) are lawful and valid and authorize EPA to condition its award to MCUA of grant funds under Title II of the Clean Water Act, 33 U.S.C. §1281 et seq., upon the requirement that MCUA assure that Sayreville adopt a system of sewer user charges in accordance with 33 U.S.C. §1284(b)(1) and 40 C.F.R. §35.929 through 35.929-3 be and the same is hereby granted, and

2. MCUA's Motion for Summary Judgment in favor of MCUA and against Sayreville is not ruled upon hereby; and

Appendix E

3. This case be and the same is hereby remanded to the Superior Court of New Jersey, Chancery Division, Middlesex County.

DICKINSON R. DEBEVOISE
United States District Judge

DATED: Dec. 1, 1981
Trenton, New Jersey

NO. 82-1154

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BOROUGH OF SAYREVILLE, JOHN E. CZERNIKOWSKI, RANIERO TRAVISANO, KENNETH W. BUCHANAN, SR., WILLIAM JACKSON, JOSEPH M. KEENAN, JR., THOMAS R. KUBERSKI and FELIX WISNIEWSKI,

Petitioners,

vs.

MIDDLESEX COUNTY UTILITIES AUTHORITY and WILLIAM FRENCH SMITH, UNITED STATES ATTORNEY GENERAL, et al.,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Except for the Point which follows hereinafter, respondent Middlesex County Utilities Authority relies for its opposition to the petition for certiorari in this matter upon the opinion of the United

States Court of Appeals for the Third Circuit, reported at 690 F.2d 358 (1982), and upon the opposition brief which will be filed in this matter by the federal agency respondents.

THE PETITION FOR CERTIORARI SHOULD BE DENIED ON GROUNDS OF ESTOPPEL.

Petitioner Sayreville joined with the other 24 municipal and the industrial participants in the Middlesex County Utilities Authority ("MCUA") system in an agreement for the undertaking of an extensive program of necessary improvements of the sewerage system requiring substantial federal assistance available under the Federal Water Pollution Control Act ("FWPCA") (P3a). It did so voluntarily, and presumably in pursuit of the common objective of upgrading the treatment processes of the MCUA complex in order

to comply with new stringent regulations for the quality of sewage effluent mandated by the Federal Water Pollution Control Act ("FWPCA") as amended in 1972. 22 U.S.C. §1251 et seq. The importance of this legislation has been the subject of frequent comment by the courts. See EPA v. State Water Resources Control Board, 426 U.S. 200 (1976); Milwaukee v. Illinois, 451 U.S. 304 (1981); Train v. City of New York, 420 U.S. 35, 45 (1975). Because all the participants in the MCUA system knew that the statute and regulations made it a prerequisite of grant of federal funds for improvement construction purposes that grantees and participants therein adopt sewer user charge systems, 33 U.S.C. 1284 (b)(1) (see P3a), it was unanimously agreed in the 1975 supplemental agreement that each participant would adopt such sewer user charge ordinances as would be

satisfactory under EPA regulations. Ibid. Knowing that MCUA and its co-participants were relying upon the performance of the agreement by all of its signatories to assure receipt of all of the funds authorized to be granted, Sayreville nevertheless reneged on the agreement. EPA thereupon withheld from MCUA 20% of the authorized federal grant (P6a). MCUA has consequently been damaged to the extent of the necessity of going into the financial markets to borrow funds to meet construction costs at considerable ongoing interest expense. Were Sayreville to be successful in its intransigent position of repudiation of its agreement, MCUA would sustain, in addition to the ongoing interest expense, a capital loss of approximately $13.5 million in withheld EPA grant funds.

We contend that in these circumstances

Sayreville should be estopped from challenging the validity of the statute and the regulations in repudiation of its 1975 agreement.

MCUA made this argument in the Court of Appeals, but that court did not deal with it.

> "It is a well recognized rule in constitutional law that estoppel may operate to prevent a party from asserting that an act is unconstitutional, unless the proceeding under the act or what is sought to be accomplished is per se illegal. Such estoppel may arise from specific conduct or from inaction". 16 Am. Jur. 2d, Constitutional Law, 207, p. 623.

The doctrine is readily invoked against a party which has proceeded or accepted benefits under the statute subsequently attacked. Id. §209, p. 625; and see State Div. of Human Rights ex rel Kozlowski v. State, 62 A.D. 2d 617, 406 N.Y.S. 2d 401 (1978). Sayreville as a participant is certainly enjoying the bene-

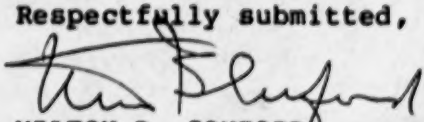
fits of the upgrading of the MCUA system achieved by use of the EPA grant funds obtained and to be obtained pursuant to the statute and regulations it now repudiates, and MCUA relied upon Sayreville's agreement to adopt a sewer user charge system satisfying the statute and regulations in going forward with the project and applying for a federal grant.

We therefore submit that certiorari should be denied on grounds of estoppel as well as for the other reasons stated in the Court of Appeals opinion and in the brief of the federal agency respondents.

CONCLUSION

For the reasons aforesaid, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,



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John A. Hoffman,
Of Counsel

Dated: January 24, 1983

No. 82-1154

In the Supreme Court of the United States

OCTOBER TERM, 1982

BOROUGH OF SAYREVILLE, ET AL., PETITIONERS

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the requirement of Section 204(b)(1) of the Clean Water Act, 33 U.S.C. (Supp. V) 1284(b)(1), that an applicant for federal sewage treatment construction grant funds adopt a system of sewer user charges as a condition to eligibility for such funds violates the Tenth Amendment.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 690 F.2d 358. The opinion of the district court (Pet. App. 24a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on October 12, 1982. The petition for a writ of certiorari was filed on January 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Clean Water Act, 33 U.S.C. (& Supp. V) 1281 *et seq.*, authorizes the Administrator of the Environmental Protection Agency to make grants of federal funds

to "any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned [waste] treatment works." 33 U.S.C. (Supp. V) 1281(g). The Administrator generally may make grants in amounts of up to 75% of the construction costs of a treatment facility if he determines that the applicant and the facility satisfy various limitations and conditions imposed by the Act. 33 U.S.C. (Supp. V) 1282(a). One such condition, found in Section 204(b)(1) of the Act, 33 U.S.C. (Supp. V) 1284(b)(1), requires any municipality that receives waste treatment services from a funded facility to adopt a system of "user charges" to pay its share of the operation, maintenance, and replacement costs of the facility.[1] The purpose of this user charge requirement is twofold: to "assur[e] that each federally assisted facility [will] have adequate operation and maintenance funds" and to "encourag[e] more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use." S. Rep. No. 95-370, 95th Cong., 1st Sess. 27 (1977). Subject to various general requirements, EPA's regulations give municipalities broad latitude in designing a user charge system. See 40 C.F.R. 35.929-1 and 35.929-2.

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[1]In relevant part, Section 204(b)(1) provides:

> Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works * * * unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction * * * will pay its proportionate share * * * of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant.

2. Petitioners are a New Jersey municipality (Sayreville) and the members of its borough council. In 1954, Sayreville joined 24 other municipalities and several industrial concerns in an agreement to have their sewage flows processed by a regional treatment plant operated by the Middlesex County Utilities Authority (MCUA). In 1975, MCUA applied to the EPA for a construction grant under Title II to expand its trunk system and treatment facility in order to comply with the effluent standards of the Act. As part of its application, MCUA and its members—including Sayreville—amended their 1954 agreement to specifically require each member municipality to " 'adopt a system of user charges * * * which, at a minimum, complies with the rules and regulations of the EPA' " (Pet. App. 3a). Notwithstanding this agreement, Sayreville failed to adopt a system of user charges, intending instead to rely upon its general revenues to fund its obligations to MCUA (Pet. 3). In 1980, after having advanced MCUA 80% of the promised federal funds, EPA suspended further payments on the ground that Sayreville had failed to adopt a system of user charges as required by the Clean Water Act, EPA's regulations, and the amended 1954 agreement (Pet. App. 5a-6a).[2]

3. In 1981, MCUA sued petitioners in New Jersey state court to enforce the amended 1954 agreement and compel petitioners to adopt a system of user charges for waste water treatment services. Claiming that the user charge requirements of Section 204(b)(1) were unconstitutional under the Tenth Amendment, petitioners impleaded the federal respondents,[3] who subsequently removed the action to federal

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[2]EPA regulations direct the Adminstrator to halt funding of construction projects when 80% of the grant funds are disbursed unless the Administrator has approved the applicant's system of user charges. 40 C.F.R. 35.935-13.

[3]Petitioners impleaded the Attorney General, the local United States Attorney, the Administrator of EPA, and several regional officers of EPA.

district court. In an oral opinion, the district court granted summary judgment for the federal respondents. The district court rejected petitioners' arguments that Section 204(b)(1)'s user charge requirement violated the Tenth Amendment, holding instead that the user charge requirement was a "valid exercise of legislative authority" (Pet. App. 28a) because "Congress may place reasonable conditions on award of funds" (*id.* at 27a). The district court found that the EPA construction grant program "is voluntary and States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of Federal funding" (*ibid.*).[4]

4. The court of appeals affirmed. The court rejected petitioners' arguments that Section 204(b)(1)'s user charge requirement violated the Tenth Amendment, reasoning instead that the requirement did not " 'directly impair' " petitioners' freedom (Pet. App. 13a). "What the condition does is to state a limitation on the expenditure of federal funds—funds which, as MCUA notes in its brief, 'MCUA and its constituent municipalities were free not to apply for' " (*id.* at 13a-14a). The court of appeals also rejected petitioners' contention that Sayreville had been denied equal protection of law because, under an exception added to the Act in 1977, similarly situated municipalities that historically had used dedicated ad valorem taxes to fund their sewage treatment programs were permitted to continue using such ad valorem taxes as a basis for a user charge system. The court concluded that the Act's sanction of dedicated ad valorem taxes was a "rational limitation" that should survive an equal protection challenge because it was limited to municipalities that already had ad valorem

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[4]The district court remanded MCUA's contract claims against petitioners to the New Jersey State courts. See Pet. App. 29a-30a.

taxes in force at the time the Act was amended in 1977 and had used the ad valorem taxes for sewage charges.[5]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and does not warrant further review.

1. Petitioners argue that Section 204(b)(1) of the Clean Water Act is unconstitutional because it impermissibly infringes upon powers of taxation reserved to the states by the Tenth Amendment (Pet. 7). However, petitioners admit—as they must—that Section 204(b)(1) does not affirmatively require any state or political subdivision to impose a users charge upon their citizens. Instead, "the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 11 (1981). See also *Rosado* v. *Wyman*, 397 U.S. 397, 408 (1970); *King* v. *Smith*, 392 U.S. 309, 316-317 (1968); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947). As the Court stated in *Pennhurst* (451 U.S. at 17):

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

Having signed an amendment to the 1954 agreement with MCUA specifically requiring Sayreville to adopt a system of user charges (Pet. App. 3a), petitioners cannot claim

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[5]Petitioners do not raise their equal protection claim before this Court. See Pet. 4 n.*.

that they were not fully aware of the terms of the federal grant that MCUA received.

To be sure, petitioners now contend (Pet. 13) that they did not accept the grant or its conditions "voluntarily" because, as a practical matter, it would have been impossible for them to comply with the effluent standards of the Act without accepting federal funds. But they did not attempt in the courts below to make a record to support this argument (see Pet. App. 14a n.8), and their assertions of fiscal soundness before this Court (Pet. 3) belie their contentions. Moreover, "in other contexts the Court has recognized that valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority." *Federal Energy Regulatory Commission* v. *Mississippi*, No. 80-1749 (June 1, 1982), slip op. 22.

2. There is no greater merit in the contention (Pet. 5-10) that Section 204(b)(1)'s user charge requirement violates the Tenth Amendment under the rationale set forth in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Even assuming that the reasoning of *National League of Cities* applies to Congress' exercise of its spending power, the user charge requirement is not invalid.[6] In *National*

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[6]In *National League of Cities*, the Court declined to express a view "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under * * * the spending power." 426 U.S. at 852 n.17. Several lower courts have found the *National League of Cities* rationale inapplicable to cases arising under Congress' spending power. See *Texas Landowners Rights Association* v. *Harris*, 453 F. Supp. 1025, 1030 (D.D.C. 1978), aff'd, 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979); *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 n.10 (E.D.N.C.), aff'd, 435 U.S. 962 (1978). Cf. *Fullilove* v. *Klutznik*, 448 U.S. 448, 475 (1980) ("The reach of the Spending Power * * * is at least as broad as the regulatory powers of Congress.").

League of Cities, the Court held that legislation may be constitutionally suspect only if it "*directly* displace[s] the States' freedom to structure integral operations in areas of traditional government functions." 426 U.S. at 852 (emphasis added). More recently, the Court has reaffirmed that direct compulsion of the States is required before a federal regulatory scheme will be found to violate the Tenth Amendment. See *Federal Energy Regulatory Commission* v. *Mississippi, supra*, slip op. 22; *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 288 (1981); see also *United Transportation Union* v. *Long Island R.R.*, No. 80-1925, slip op. 8 (Mar. 24, 1982). Here, the court of appeals correctly found that there was no direct impairment of Sayreville's freedom to structure its integral operations, since Section 204(b)(1) is merely a condition of federal aid, which " 'MCUA and its constituent municipalities were free not to apply for' " (Pet. App. 14a).[7]

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[7]Because the user charge requirement does not directly impair the states' freedom, there is no need to address the question whether the federal interest in water pollution control would be sufficiently strong to justify the requirement under the rationale of *National League of Cities*. See *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, 452 U.S. at 288 n.29. However, as the court of appeals correctly recognized (Pet. App. 14a n.8), Justice Blackmun emphasized in his concurrence in *National League of Cities* that the Court's holding would not apply "in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856. Moreover, the cases cited by petitioners in support of their contention that environmental protection is not sufficiently important to salvage an otherwise unconstitutional scheme deal with attempts by EPA directly to require states to establish particular environmental programs, and not with conditions attendant to grants of federal funds. Indeed, in one case cited by petitioners, *Maryland* v. *EPA*, 530 F.2d 215, 228 (4th Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977), the court of appeals distinguished the direct regulation found in that case from cases involving conditions accompanying federal grants, concluding that the latter generally do not violate the Tenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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FEBRUARY 1983

DOJ-1983-02